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# Book Review of The Insanity Defense and the Trial of John W. Hinckley, Jr., by Lincoln Caplan

Michael L. Perlin

*New York Law School*, [michael.perlin@nyls.edu](mailto:michael.perlin@nyls.edu)

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## BOOKS REVIEWED

### THE THINGS WE DO FOR LOVE: JOHN HINCKLEY'S TRIAL AND THE FUTURE OF THE INSANITY DEFENSE IN THE FEDERAL COURTS

*A Review of THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* By Lincoln Caplan. Boston, Massachusetts: David R. Godine, 1984. Pp. 135.

Reviewed by Michael L. Perlin\*

Once a generation, a court proceeding (usually, but not always, a criminal trial) captures and consumes the hearts and minds of the American public. The distinctly *non-majoritarian* branch—the judiciary—is scrutinized through the refractory lens of public opinion (and its sometimes-*doppelganger*, the mass media's *perceptions* of public opinion). Whether the verdict is consistent with public opinion or whether the public is outraged, the mere *fact* of the decision or trial will compel changes—procedural and/or substantive—in the area in question.

Such a trial, of course, was the trial of John W. Hinckley, Jr., charged with the attempted assassination of President Reagan and the attempted murders of three others,<sup>1</sup> committed in a vain effort to win the heart of Jodie Foster, a young actress with whom Hinckley was obsessed.<sup>2</sup> The “loud and passionate” public debate that followed the

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\* Associate Professor of Law, New York Law School. A.B., 1966, Rutgers University; J.D., 1969, Columbia University School of Law.

1. Pretrial rulings are reported in *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *opinion clarified and reconsideration denied*, 529 F. Supp. 520 (D.D.C.), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

2. For the extent of Hinckley's obsession with Foster, see L. CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 38-43, 72-78 (1984). The letter Hinckley wrote to Foster on the day he shot the President speaks for itself:

3/30/81

12:45 P.M.

Dear Jodie,

There is a definite possibility that I will be killed in my attempt to get Reagan. It is for this reason that I am writing you this letter now.

As you well know by now I love you very much. Over the past seven months I've left you dozens of poems, letters and love messages in the faint hope that

jury verdict of not guilty by reason of insanity (NGRI)<sup>3</sup> did not yield ambiguous results: Eighty-three percent of respondents to an ABC overnight poll thought "justice was not done."<sup>4</sup> The most "celebrated"<sup>5</sup>

you could develop an interest in me. Although we talked on the phone a couple of times I never had the nerve to simply approach you and introduce myself. Besides my shyness, I honestly do not wish to bother you with my constant presence. I know that the many messages left at your door and in your mailbox were a nuisance, but I felt it was the most painless way for me to express my love for you.

I feel very good about the fact that you at least know my name and know how I feel about you. And by hanging around your dormitory, I've come to realize that I'm the topic of more than a little conversation, however full of ridicule it may be. At least you know that I'll always love you.

Jodie, I would abandon this idea of getting Reagan in a second if I could only win your heart and live out the rest of my life with you, whether it be in total obscurity or whatever.

I will admit to you that the reason I'm going ahead with this attempt now is because I just cannot wait any longer to impress you. I've got to do something now to make you understand, in no uncertain terms, that I'm doing all of this for your sake! By sacrificing my freedom and possibly my life, I hope to change your mind about me. This letter is being written only an hour before I leave for the Hilton Hotel. Jodie, I'm asking you to please look into your heart and at least give me the chance, with this historical deed, to gain your respect and love.

I love you forever,

John Hinckley

*Id.* at 11-12.

Hinckley's obsession with Foster arose after he "happened upon" the movie *Taxi Driver* in which Foster played a young prostitute whom the movie's protagonist attempts to rescue. *Id.* at 10. The protagonist was played by Robert DeNiro. *Id.* at 76. Hinckley saw *Taxi Driver* at least fifteen times. *Id.* The movie was also played at his trial as part of the defense's case, *id.* at 88, and eventually Hinckley "cast himself" as Travis Bickle, "a lonely, friendly, girlfriendless man." *Id.* at 76:

Travis met the child-prostitute Iris—played by Jodie Foster—befriended her, saw her as oppressed by pimps, and vowed to rescue her; Hinckley saw Jodie Foster as an innocent, trapped in society, a prisoner at Yale [where she was a student], and he vowed to liberate her.

*Id.* at 77.

3. The insanity test used in "federal" cases in the District of Columbia at the time was that of the American Law Institute's MODEL PENAL CODE § 4.01 (1962), as adopted in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc): A defendant is not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of the law." *Id.* at 973. Because the *Hinckley* case was tried under the "federal" insanity rules, see *Davis v. United States*, 160 U.S. 469 (1895), the government had the burden of disproving the defense beyond a reasonable doubt; had the court chosen to charge the jury under the District of Columbia "local" rules on the 10 counts of the 13-count indictment which did not charge federal crimes, the defense would have had the burden of proving insanity by a preponderance of the evidence. D.C. CODE ANN. § 24-301(j) (1981).

4. L. CAPLAN, *supra* note 2, at 116.

5. *Id.* at 20.

insanity trial in American history had instantly become the most "outrageous"<sup>6</sup> verdict. Separate streams of public opinion—outrage over the courts' perceived "softness on crime"; outrage over an apparent increase in crime; outrage over a jurisprudential system that could even allow a defendant who shot the President in cold blood (on national television) to plead "not guilty" (by *any* reason); outrage at a jurisprudential system that countenanced obfuscatory and confusing testimony by competing teams of psychiatrists as to the proper characterization of a defendant's mental illness; in short, outrage over the "abuse" of the insanity defense<sup>7</sup>—became a river of fury after the NGRI verdict was announced.<sup>8</sup>

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Ironically, the most "celebrated" insanity defense pre-Hinckley involved a *successful* presidential assassination: the murder of President James Garfield by Charles Guiteau. *Id.* at 20. For a comprehensive account of the Guiteau trial, see C. ROSENBERG, *THE TRIAL OF THE ASSASSIN GUTEAU: PSYCHIATRY AND LAW IN THE GILDED AGE* (1968). Guiteau's insanity defense was rejected, and he was ultimately executed.

For an account of an even earlier use of the insanity defense in a trial following an attempted presidential assassination, see Zonana, *The First Presidential Assassination Attempt*, 12 BULL. AM. ACAD. PSYCH. & L. 309, 314-15 (1984) (trial of Richard Laurence for assault on President Jackson; plaintiff found not guilty by reason of insanity after five minutes of jury deliberation, and was ultimately hospitalized for 26 years until his death).

6. The word "outrage" appears consistently in all accounts of responses to the *Hinckley* verdict. See, e.g., I. KEILITZ & J. FULTON, *THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS* 3 (1984); W. WINSLADE & J. ROSS, *THE INSANITY PLEA* 182 (1983); Note, *The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety?*, 22 AM. CRIM. L. REV. 49 (1984); Morse, *In Defense of The Insanity Defense*, Los Angeles Times, June 23, 1982, pt. II, at 7, reprinted in *Insanity Defense In Federal Courts: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 243 (1982) [hereinafter cited as *Insanity Hearings*].

Of course, the use of the word "outrage" in this context is not new. See, e.g., M. KAVANAGH, *THE CRIMINAL AND HIS ALLIES* 90 (1928), charging that, because "skillful criminal lawyers" can turn insanity defense trials into "emotional disputes, . . . in cases where insanity is presented as a defense, so many verdicts which outrage justice are returned." *Id.* (emphasis added).

7. Cf. Moran, *Preface*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 9 (1985) [hereinafter cited as *ANNALS*]:

The insanity defense is the most abused defense. No other defense has been so denounced or so routinely criticized . . . . There has always been a perception that the defense is peculiarly open to fraud and misrepresentation; that it has been employed mainly as a last, desperate resort by guilty defendants; that it allows the guilty to escape the stern hand of justice; and that it does not sufficiently protect society from the wrath of criminal madmen.

*Id.*

8. The "swift and vociferous public outrage," I. KEILITZ & J. FULTON, *supra* note 6, at 3, took many forms. A year after the verdict, Trial Judge Barrington Parker told the *Washington Post*:

An appreciable amount of the correspondence was regrettably gross, insulting and blatantly racial. The "black judge"—the "all black jury" (all but one),

Congress, not surprisingly, listened. Within days of the verdict, twenty-six different pieces of legislation to abolish or sharply curtail<sup>9</sup> the use of the insanity defense were introduced to "change the ground rules."<sup>10</sup> Although the Nixon Administration had been singularly unsuccessful in its attempt to gut the defense less than a decade earlier,<sup>11</sup> the notion that a would-be presidential assassin could "beat the rap" by any means fueled the fires to such an extent that it was impossible for the insanity defense to escape unscathed.

After the first roar of public opinion, however, most of the relevant professional associations<sup>12</sup> began to marshal their forces for a counter-attack. Faced with a nearly united front presented by the American

and the location of the trial in a "black city" were all tied to "blacks'" known dislike and hatred of Reagan.

L. CAPLAN, *supra* note 2, at 117. The irony, of course, is that Hinckley had toyed with membership in the National Socialist Party (the American Nazis), and characterized himself as "an all-out anti-Semite and white racist." *Id.* at 35.

9. See, e.g., S.2745, 97th Cong., 2d Sess. (1982), reprinted in *The Insanity Defense: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 541-45 (1982) (proposal to amend Title 18 of the Judiciary Code to eliminate mental condition as a defense to any charge of criminal conduct). The bills that first received the Reagan Administration's endorsement approached, but did not reach, the "pure" abolitionist position; they would have made insanity a defense only where, as a result of mental disease or defect, the defendant lacked the *mens rea* required as an element of the offense. For a discussion of the subsequent shift by the Reagan Administration, see *infra* note 18.

10. L. CAPLAN, *supra* note 2, at 104.

11. See Rodriguez, LeWinn & Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 *RUTGERS L.J.* 397, 398 n.2 (1983):

Ironically, the United States Congress has undertaken similar deliberations. In 1975 and 1976, the United States Senate spent months debating a massive criminal law reform omnibus bill which included a provision abolishing the insanity defense. See S.1, 94th Cong., 1st Sess. (1975). For a full analysis of the relevant portions of the bill, see Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S.1: Squeezing a Lemon*, 124 *U. PA. L. REV.* 687 (1976). That provision died in committee after extensive scrutiny and consideration. See 34 *CONG. Q.* 586 (Mar. 13, 1976); 33 *CONG. Q.* 2385 (Nov. 8, 1975).

*Id.* For the possible origins of former President Nixon's charges that the defense had been subject to "unconscionable abuse by defendants," see Gerber, *The Insanity Defense Revisited*, 1984 *ARIZ. ST. L.J.* 83, 117-18.

12. Only the American Medical Association recommended that the defense be abolished:

[The insanity defense] has outlived its principal utility, it invites continuing expansion and corresponding abuse, it requires juries to decide cases on the basis of criteria that defy intelligent resolution in the adversary forum of the courtroom, and it impedes efforts to provide needed treatment to mentally ill offenders. As a result, it inspires public cynicism and contributes to erosion of confidence in the law's rationality, fairness, and efficiency.

*The Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony*, 1983 *A.M.A. REP. OF BD. OF TRUSTEES* 32-33, reprinted in I. KEILITZ & J. FULTON, *supra* note 6, at 41.

Bar Association,<sup>13</sup> the American Psychiatric Association,<sup>14</sup> the ABA's Standing Committee on Association Standards for Criminal Justice,<sup>15</sup> the National Conference of Commissioners on Uniform State Laws,<sup>16</sup> and the specially-created National Commission on the Insanity Defense,<sup>17</sup> the Reagan Administration quietly dropped its abolition cry,<sup>18</sup> and agreed to support a "reform compromise."<sup>19</sup>

13. See, e.g., *Reform of the Federal Insanity Defense: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 26 (1983) [hereinafter cited as *Reform Hearings*] (ABA Policy on the Insanity Defense).

14. See *id.* at 136 (*American Psychiatric Association Statement on the Insanity Defense*).

15. See *id.* at 37 (*ABA Criminal Justice Mental Health Standards* (First Tentative Draft, Mar. 7, 1983)). These standards were ultimately adopted, with minor modifications, at the ABA's annual meeting in August 1984.

16. See MODEL INSANITY DEFENSE AND POST-TRIAL DISPOSITION ACT § 201 comment (1984).

17. *Reform Hearings*, *supra* note 13, at 90. See generally NATIONAL MENTAL HEALTH ASSOC., MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE (1983) [hereinafter cited as MYTHS & REALITIES], stressing the degree to which "the public, the legal profession and specifically legislators dramatically and grossly overestimate both the frequency and the success rate of the plea." *Id.* at 15 (emphasis added) (quoting testimony of Joseph H. Rodriguez, Public Advocate of the State of New Jersey, made during the course of the *Insanity Hearings*, *supra* note 6, at 246).

18. The position change came in the footnote to supplemental testimony of a then mid-level Justice Department bureaucrat. See *Reform Hearings*, *supra* note 13, at 255 n.1 (testimony of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice):

[O]ur review of the numerous bills that have been introduced and our recognition of the apparent consensus that has developed for the approach of H.R. 1280—which reflects the position of the ABA and APA—have persuaded the Administration that there is also substantial merit in this approach, and accordingly to include this version of the insanity defense itself, in our draft bill.

*Id.*

19. *Id.* The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1840, as signed by President Reagan, included the following language:

(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the acts constituting the offense, the defendant as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) BURDEN OF PROOF.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

*Id.* tit. II, § 402(a), 98 Stat. 1840, 2057 (to be codified at 18 U.S.C. § 20).

In addition, the bill amended the *Federal Rules of Evidence* to curtail the scope of expert evidence in insanity cases:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition consti-

That "reform" had the effect of returning the insanity defense in federal jurisdictions to *status quo ante* 1843: the year of the celebrated *M'Naghten* decision<sup>20</sup> which adopted the rigid, cognitive-only criminal responsibility test,<sup>21</sup> a test that dominated American criminal law for more than a century.<sup>22</sup> Interestingly, in the afterglow of the white light of outrage left by the *Hinckley* verdict, this retreat—to a test characterized three decades ago by the eminent psychiatrist Dr. Gregory Zilboorg as "the impenetrable wall behind which sits entrenched the almost unconquerable prosecutor; it is the monster of the earnest psychiatrist which prevents him from introducing into the courtroom true understanding of human psychology and the psychology of the criminal act"<sup>23</sup>—was considered a major tactical victory by *proponents* of the defense.<sup>24</sup>

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tuting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704.

20. 8 Eng. Rep. 718 (1843).

21. Criticism of the *M'Naghten* test is legion. See, e.g., S. GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE 43-48 (Johns Hopkins ed. 1966) ("in actual administration, the tests of irresponsibility have had the rigidity of an army cot and the flexibility of a Procrustean bed"); A. GOLDSTEIN, THE INSANITY DEFENSE 233-34 n.3 (1967) (collected criticisms); H. HUCKABEE, LAWYERS, PSYCHIATRISTS AND CRIMINAL LAW: COOPERATION AND CHAOS 11 (1980); H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 144-49 (1972). For a full account of the *M'Naghten* case, see R. MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY-DEFENSE OF DANIEL McNAUGHTAN (1981).

The NGRI verdict in the *M'Naghten* case inspired virtually the same sentiments as did the *Hinckley* verdict nearly a century and a half later. "The public was alarmed by the verdict. It felt unprotected from the wrath of madmen who they feared could now kill with impunity." *Id.* at 19. Both the British press and Queen Victoria were similarly disturbed by the verdict: The London *Standard* charged that "mad doctors" were permitted to "dictate the law." The *Standard*, Mar. 9, 1843, at 1, quoted in R. MORAN, *supra*, at 19. The Queen wondered why the law was of "no avail," since "everybody is morally convinced that [the] malefactor . . . [was] perfectly conscious and aware of what [he] did." *Queen Victoria's Letters*, Royal Archives RA 14/8, quoted in R. MORAN, *supra*, at 20.

22.

The *M'Naghten* rule instructs the jury: that every man is to be presumed to be sane, and . . . that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

A. GOLDSTEIN, *supra* note 21, at 42 (quoting *M'Naughten's Case*, 8 Eng. Rep. 718 (1843)). For a historical background, see A. GOLDSTEIN, *supra* note 21, at 1-96, 233 n.1.

23. G. ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 10 (1954).

24. See Milner, *What's Old and New About the Insanity Plea*, 67 JUDICATURE 499 (1984). Although the National Commission on the Insanity Defense was established as an independent commission by the National Mental Health Association, the Association was interested in maintaining the plea. The Commission carried out "a tactical retreat in

Each of the major threads of this saga<sup>25</sup> is considered, analyzed, and ultimately intertwined in Lincoln Caplan's *The Insanity Defense and The Trial of John W. Hinckley, Jr.* The book is simply the finest, most penetrating, and most elegantly crafted single volume ever written about the raw nerve at the cutting edge<sup>26</sup> of law and psychiatry.

Caplan's position is clear: The legislative "rush to judgment"<sup>27</sup> which followed the *Hinckley* acquittal was a "step toward tyranny."<sup>28</sup> It stemmed from a "misleading"<sup>29</sup> and "false"<sup>30</sup> choice that countenanced "the erosion of liberty for the sake of security [thus] threaten[ing] fundamental principles."<sup>31</sup> The senators responsible for the new legislation chose to interpose insanity defense "reform" as a "surrogate for resolution of the most profound issues in criminal justice, and, between polar views about crime, punishment, and responsibility, [they] chose to emphasize retribution".<sup>32</sup>

They may have gained the satisfaction of grappling with a large issue. They may also have taken out on a narrow legal problem the frustrations citizens feel with a disorderly, unmanageable, and daunting system, and, by voting to cut back the insanity defense, shown a willingness to give up a civilized standard for a harsh reminder of the balance of power between the individual and society.<sup>33</sup>

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the face of renewed pressure to abolish the insanity defense. It attempt[ed] to outflank the abolitionists by redefining the problem." *Id.* at 505.

25. The trial of John Hinckley itself; the would-be assassin's "career" as a confused, pathetic lover; the confusion as to the psychodynamic forces which impelled Hinckley to act as he did (was he insane? grandiose? narcissistic? or did he suffer only from what some reporters covering the trial labeled as "dementia suburbia"?); the "battle of the experts"; the atypicality of the *Hinckley* trial; the significance of the responsibility test used for "federal" cases in the District of Columbia and its scheme in the entire history of the development of the insanity defense; the trial's impact on the public and Congress; the myths and realities which surround all aspects of the insanity defense; the passage of new "reform" legislation. See L. CAPLAN, *supra* note 2.

26. See *Insanity Hearings*, *supra* note 6, at 244 (Rodriguez testimony) ("[The Hinckley trial] has put the spotlight on the insanity defense which is really the cutting edge so far as society is concerned and the raw nerve of the intersection between the criminal justice system and the mental health system."); see also *Rodriguez Testifies on New Jersey's Insanity Defense*, 110 N.J.L.J. 453, 473 (1982) ("The insanity defense is the cutting edge, or, perhaps more accurately, the raw nerve at the intersection between criminal law and mental health systems.").

27. See MYTHS & REALITIES, *supra* note 17, at 5.

28. L. CAPLAN, *supra* note 2, at 5.

29. *Id.* at 4.

30. *Id.* at 5.

31. *Id.* at 4.

32. *Id.* at 127.

33. *Id.*



In assessing the data that lead him—ineluctably—to this conclusion, Caplan paints numerous deft and striking portraits of the participants in the trial<sup>34</sup> and casts new light on the tortured tale of John Hinckley's childhood.<sup>35</sup> Caplan ably synthesizes the history of the competing insanity defense tests<sup>36</sup> and cross-cuts with astonishing clarity and precision throughout the *Hinckley* case: parallel developments in a contemporaneous trial of an obscure defendant raising an insanity defense;<sup>37</sup> the political maneuverings in the days following the verdict;<sup>38</sup> the true issues of human behavior, responsibility, morality, and jurisprudence raised by the insanity defense debate;<sup>39</sup> and the debate's ramifications for the future of the Republic.<sup>40</sup> In each instance, Caplan is persuasive and compelling,<sup>41</sup> especially in his relentless pursuit of the basic meretriciousness of the politically motivated abolition position,<sup>42</sup> as fronted by such Reagan Administration stalwarts as former

34. See, e.g., *id.* at 67 (describing defense witness Dr. William Carpenter as "a tall man with a silvery beard and shoulder-length hair [who] folded into the witness stand [and] resembled Father Time"); *id.* at 68 (describing prosecution witness Dr. Park Deitz as "large and carefully groomed, [with] full cheeks and a quizzical brow. For whatever reason, sketch artists at the trial stumbled over Deitz, and said they made him look evil when they didn't mean to."); *id.* at 84 (describing defense witness Dr. David Bear, whose "outburst had changed him from . . . 'the son-in-law every Jewish mother wants for her daughter' . . . to a determined pedant, his furies unleashed").

35. *Id.* at 33-47.

36. *Id.* at 19-32. Prior to Hinckley, virtually all "infamous defendants," including those who raised the insanity defense after attacking Robert Kennedy, Martin Luther King, Jr., John Lennon, Gerald Ford, and George Wallace, were unsuccessful. *Id.* at 31-32. "Hinckley broke the string, kindling a new trial of the insanity defense." *Id.* at 32.

37. *Id.* at 49-58.

38. *Id.* at 101-07.

39. *Id.* at 108-16.

40. *Id.* at 1-5, 125-27.

41. In the spirit of disclosure, the author must confess that one reason Caplan is so "persuasive" is that Caplan's positions are not dissimilar to his. See, e.g., PERLIN, AFTER HINCKLEY: OLD MYTHS, NEW REALITIES, AND THE FUTURE OF THE INSANITY DEFENSE (5 Directions in Psychiatry, Lesson 22, 1985); Perlin & Sadoff, *The Adversary System*, in VIOLENCE: PERSPECTIVES ON MURDER AND AGGRESSION 394 (1978); Perlin, *Psychiatric Testimony in a Criminal Setting*, 3 BULL. AM. ACAD. PSYCH. & L. 143 (1975); Perlin, *Overview of Rights in the Criminal Process: Rights of the Mentally Handicapped in the Criminal Process*, in 3 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 1879 (1979) [hereinafter cited as *Criminal Process Rights*]; Perlin, *Whose Plea is it Anyway? Insanity Defense Myths and Realities*, 79 PHILADELPHIA MED. 5 (1983); Rodriguez, LeWinn & Perlin, *supra* note 11.

42. The motivations of the "law and order right" abolitionists often differ from the motivations of the "academic left" abolitionists. See, e.g., T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 212 (1963); N. KITTRIE, THE RIGHT TO BE DIFFERENT 398-404 (1973). See generally Katz & Goldstein, *Abolish The Insanity Defense—Why Not?*, 72 YALE L.J. 853, 865 (1963). These motivations in turn differ from those of the "bureaucratic center," which views insanity acquittees as "political albatrosses" that thwart the hospital's decision-making autonomy; see *Criminal Process Rights*, *supra* note 41, at 1891.

Attorney General William French Smith and current Attorney General Edwin Meese.<sup>43</sup> The "daunting—and hyperbolic—choice [thrown down by the Attorney General] between liberty and security, between protection of the individual and protection of society,"<sup>44</sup> Caplan argues, is a false choice. He cites reams of uncontroverted evidence adduced at the several congressional and special committee hearings<sup>45</sup> flatly contradicting the assumptions offered by the pro-abolitionists as revealed truth.<sup>46</sup> Caplan specifically refers to evidence showing that the insanity defense is seldom used successfully in homicide cases:<sup>47</sup> *After its successful use, insanity acquittees are generally confined twice as long as felons convicted of similar charges,*<sup>48</sup> and their recidivism rate is lower than that of convicted felons.<sup>49</sup>

The Administration's position can be interpreted in many ways. It can be viewed as a simple reflection of overwhelming public opinion,<sup>50</sup>

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43. L. CAPLAN, *supra* note 2, at 3. Attorney General Smith told a Senate Committee that "[m]odification of the insanity defense is a major element of the program needed to restore the effectiveness of Federal law enforcement," *The Insanity Defense: Hearings before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 27 (1982) (emphasis added) [hereinafter cited as *Insanity Defense Hearings*], and to "restore the balance between the forces of law and the forces of lawlessness." *Id.* at 26.

44. L. CAPLAN, *supra* note 2, at 3.

45. See, e.g., *Insanity Hearings*, *supra* note 6; *Reform Hearings*, *supra* note 13; *Insanity Defense Hearings*, *supra* note 43. The National Commission on the Insanity Defense, see *supra* note 17, also held its own hearings. See MYTHS & REALITIES, *supra* note 17.

46. L. CAPLAN, *supra* note 2, at 110. A few days prior to the Hinckley shooting, Senator Orrin Hatch submitted a statement to the *Congressional Record* on his proposal to abolish the insanity defense "without citing any statistics or detailed analyses." *Id.*

47. *Id.* at 102-04. A Justice Department survey revealed that in 1981 "only four federal defendants were acquitted of charges on the basis of a successful insanity defense." *Id.* at 104. For statistical studies in support of Caplan's propositions on these points, see Rodriguez, LeWinn & Perlin, *supra* note 11, at 400 nn.18-50. For the most recent update, see Steadman, *Empirical Research on the Insanity Defense*, in ANNALS, *supra* note 7, at 58.

48. L. CAPLAN, *supra* note 2, at 104.

49. *Id.*

50. *Id.* at 116. It has been suggested that legislative fear of public outcry following an infamous insanity acquittee's release is a significant factor in the shaping of such release laws. See, e.g., Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty By Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233, 276 n.380 (1978). See generally *Jones v. United States*, 463 U.S. 354 (1983) (insanity acquittees are a "special class" subject to "an inference of continuing mental illness" and dangerousness). For an analysis of *Jones*, suggesting that that case would discourage the use of the insanity defense in the future, see Singer, *The Aftermath of an Insanity Acquittal: The Supreme Court's Recent Decision in Jones v. United States*, in ANNALS, *supra* note 7, at 114; for a full and comprehensive analysis of *Jones*, see Margulies, *The "Pandemonium Between the Mad and the Bad": Procedures for the Commitment and Release of Insanity Acquittes After Jones v. United States*, 36 RUTGERS L. REV. 793 (1984).

as a cynical symbol "play[ing] on feelings of vengeance and fear,"<sup>51</sup> or as an attempt to push "our concerns about the failure of the whole criminal justice system into the insanity defense."<sup>52</sup>

In another context, the philosopher J.C. Flugel suggested over twenty years ago that "our whole notion of justice is threatened when we observe that a criminal has gone unpunished,"<sup>53</sup> thus disturbing our moral and psychological equilibrium: In short, to maintain our entire psychological and social structure, we must show the guilty party that he "can't get away with it."<sup>54</sup> Viewing the insanity defense as "a powerful symbol, a scapegoat for the failures of the entire criminal justice system,"<sup>55</sup> Senior Circuit Judge David L. Bazelon<sup>56</sup> suggested that the attack on the insanity defense "is not about criminal justice policy," but rather is "an attack on a way of thinking about crime and criminals."<sup>57</sup> The attack reflected a "consciously fictional model of human action . . . demand[ing] willful ignorance . . . [and] reject[ing] individualization [that] is a prerequisite to a moral system of criminal justice."<sup>58</sup>

Whichever analysis (or combination) is correct, Caplan's conclusion is the same: The Justice Department's desire for a "show trial"<sup>59</sup> led to a "sacrifice" of a verdict,<sup>60</sup> which, in turn, spurred "reform" leg-

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51. L. CAPLAN, *supra* note 2, at 117.

52. *Id.* (quoting Dr. Loren Roth).

53. J. FLUGEL, *MAN, MORALS AND SOCIETY: A PSYCHO-ANALYTICAL STUDY* 169-70 (1961). Professor Flugel states that psychoanalysts recognize three main motives in the public's attitude towards law-breakers and criminals: first, the criminal provides an outlet for our (moralized) aggression; second, the criminal, by his flouting of law and moral rule, constitutes a temptation to the id: "[t]his stirring of criminal impulses within ourselves calls for an answering effort on the part of the super-ego, which can best achieve its object by showing that 'crime doesn't pay'"; and third, our whole notion of justice is threatened when we observe that a criminal has gone unpunished. *Id.*

54. *Id.* at 169.

55. Bazelon, *The Insanity Defense: Symbol and Substance*, Address to the 15th Annual Meeting of the American Academy of Psychiatry and the Law (Oct. 27, 1984).

56. Judge Bazelon was, of course, the architect of the famous (but now discarded) opinion in *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954) ("Our collective conscience does not allow punishment where it cannot impose blame.") (quoting *Holloway v. United States*, 148 F.2d 665, 666 (D.C. Cir. 1945)). It was Judge Bazelon who "invited the world of mental health professionals and criminologists into his courtroom and has extended his courtroom back into the world." Bazelon, *Psychiatrists and the Adversary Process*, *SCI. AM.*, June 1974, at 18.

57. Bazelon, *supra* note 55.

58. *Id.*

59. L. CAPLAN, *supra* note 2, at 125-26. The Justice Department had rejected the terms of a plea bargain suggested by the defendant. (In exchange for a plea of guilty to all counts of the indictment, defendant would be sentenced to concurrent prison terms making him eligible for parole in 15 years.) *Id.*

60. *Id.* at 126.

isolation resting "on ideology more than fact."<sup>61</sup> That legislation gives up "a civilized standard [in exchange for] a harsh reminder of the balance of power between the individual and society."<sup>62</sup> Caplan insists that the true sacrifice has been nothing less than the moral integrity of the American criminal justice system.<sup>63</sup>

Although other scholarly commentators have found it "difficult to fathom" how the insanity defense "can engender the profusion of scholarly and popular literature that it has,"<sup>64</sup> and although an Arizona Superior Court judge has recently characterized the on-going debate as a "legal taffy-pull,"<sup>65</sup> Caplan correctly perceives that the issues raised go to the "core philosophical premise of criminal law"<sup>66</sup>—"[t]he reality of a 'significant' degree of free choice."<sup>67</sup> He knows that our ultimate decision as to the future of the insanity defense will finally be viewed in the context of nearly a millenium of recorded legal history.<sup>68</sup> Caplan is well aware that attempts "to abolish or eviscerate the defense in an

61. *Id.*

62. *Id.* at 127.

63. While public outrage has focused on Hinckley's use of the insanity defense, there has been virtually no attention paid to the remarkable ease with which Hinckley was able to obtain a vast arsenal of guns for a period of two years prior to the shooting. *See id.* at 35-40 (defendant purchased a .38 pistol in August 1979, a 6.5 caliber rifle in January 1980, two boxes of Devastators (exploding-head bullets) in June 1980, a .22 rifle in 1980, two .22 pistols in September 1980, two .22 pistols and two boxes of shells in November 1980, and a .38 revolver—the same type gun used by Mark Chapman to kill John Lennon—in January 1981). *Cf.* Logan, *Around City Hall: Notes From the Underground*, NEW YORKER, Jan. 28, 1985, at 72-79 (quoting Harvard Professor James Q. Wilson's ironic comment that "so many liberals have been mugged that the [Bernard Hugo Goetz] shooting didn't result in a single call for gun control").

Although other titles of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1840, do call for mandatory penalties for the use of firearms in a federal crime of violence, *see, e.g., id.* § 1005 (amending 18 U.S.C. § 924(c)), nothing in the legislative history appears to correlate the passage of this title with the Hinckley shooting. *See, e.g., Report of the U.S. Senate Committee on the Judiciary on the Comprehensive Crime Control Act of 1983*, S. Rep. No. 225, 98th Cong., 1st Sess. 312-14 (1983).

64. I. KEILITZ & J. FULTON, *supra* note 6, at vii ("It is difficult to fathom how the criminal defense of insanity, which is used so infrequently, can engender the profusion of scholarly and popular literature that it has.").

65. R. GERBER, *THE INSANITY DEFENSE* 1 (1984).

66. D. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 3 (1983). "One leading American legal commentat[or] identifi[ed] the core philosophical premise of the criminal law as the assertion of 'the reality of a 'significant' degree of free choice, and that is incompatible with the thesis that the conduct of normal adults is merely a manifestation of imperious psychological necessity.'" *Id.* (quoting J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 455 (1960)).

67. D. HERMANN, *supra* note 66, at 3 (quoting J. HALL, *supra* note 66, at 455).

68. The insanity defense has been extant since at least the twelfth century. For a historical overview of the insanity defense, *see* Rodriguez, LeWinn & Perlin, *supra* note 11, at 406 n.56; Walker, *The Insanity Defense Before 1800*, in *ANNALS*, *supra* note 7, at 25.

attempt to respond to . . . misconceptions would be shortsighted, unnecessary and counterproductive."<sup>69</sup>

Caplan's position is neither radical nor impractical. It reflects hundreds of years of experience based on Blackstone's basic premise that "free will is the postulate of responsibility."<sup>70</sup> His position also reflects the view that abolishing the insanity defense "would cut the criminal law loose from its moorings of condemnation for moral failure."<sup>71</sup> As Chief Judge Hornblower stated 130 years ago in the first reported insanity defense case in New Jersey:

GOD and humanity forbid that it should ever be, that courts should frown upon insanity as a defence, or that if a jury are satisfied beyond a reasonable doubt, that the act complained of was committed when the accused was insane, they should for one moment hesitate in pronouncing a verdict of acquittal. . . .<sup>72</sup>

With this book, Lincoln Caplan casts his vote squarely on the side of "God and humanity."

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69. Rodriguez, LeWinn & Perlin, *supra* note 11, at 425.

70. 4 W. BLACKSTONE, COMMENTARIES \*20 ("All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of *will*.").

71. Monahan, *Abolish the Insanity Defense—Not Yet*, 26 RUTGERS L. REV. 719, 731 (1973) (quoting Livermore & Meehl, *The Virtues of M'Naghten*, 51 MINN. L. REV. 789, 797 (1967)).

72. *State v. Spencer*, 21 N.J.L. 196, 206 (Sup. Ct. 1846) (Hornblower, C.J.).